PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

**Rule 5.1. Preliminary Examination**

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(d) PRODUCTION OF STATEMENTS.

(1) *In General*. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.

(2) *Sanctions for Failure to Produce Statement.* If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (d) mirrors similar amendments made in 1993 which extended the scope of Rule 26.2 to Rules 32, 32.1, 46 and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As indicated in the Committee Notes accompanying those amendments, the primary reason for extending the coverage of

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* New matter is underlined; matter to be omitted is lined through.

Rule 26.2 rested heavily upon the compelling need for accurate information affecting a witness' credibility. That need, the Committee believes, extends to a preliminary examination under this rule where both the prosecution and the defense have high interests at stake.

A witness' statement must be produced only after the witness has personally testified.

**Rule 26.2. Production of Witness Statements**

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(g) SCOPE OF RULE. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

(1) in Rule ~~32(e)~~ 32(c)(2) at sentencing;

(2) in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release;

(3) in Rule 46(i) at a detention hearing; ~~and~~

(4) in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 ~~.~~ ; and

(5) in Rule 5.1 at a preliminary examination.

COMMITTEE NOTE

The amendment to subdivision (g) mirrors similar amendments made in 1993 to this rule and to other Rules of Criminal Procedure which extended the application of Rule 26.2 to other proceedings, both pretrial and post-trial. This amendment extends the requirement of producing a witness' statement to preliminary examinations conducted under Rule 5.1.

Subdivision (g)(1) has been amended to reflect changes to Rule 32.

**Rule 31. Verdict**

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(d) POLL OF JURY. When a verdict is returned and before it is recorded, the court, at the request of any party or upon its own motion, shall poll the jurors individually. ~~jury shall be polled at the request of any party or upon the court's own motion.~~ If ~~upon~~ the poll reveals a lack of unanimity ~~there is not unanimous concurrence~~, the court may direct the jury ~~may be directed~~ to retire for further deliberations or it may ~~be discharged~~ discharge the jury.

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COMMITTEE NOTE

The right of a party to have the jury polled is an "undoubted right." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Its purpose is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id*.

Currently, Rule 31(d) is silent on the precise method of polling the jury. Thus, a court in its discretion may conduct the poll collectively or individually. As one court has noted, although the prevailing view is that the method used is a matter within the discretion of the trial court, *United States v. Miller*, 59 F.3d 417, 420 (3d Cir. 1995) (citing cases), the preference, nonetheless of the appellate and trial courts, seems to favor individual polling. *Id*. (citing cases). That is the position taken in the American Bar Association Standards for Criminal Justice § 15-4.5. Those sources favoring individual polling observe that conducting a poll of the jurors collectively saves little time and does not always adequately insure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response. On the other hand, an advantage to individual polling is the "likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors." *United States v. Miller*, *supra*, at 420, *citing Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961, n. 6 (1st Cir. 1986).

**Rule 33. New Trial**

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If

trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after ~~final judgment,~~ the verdict or finding of guilty. ~~but if~~ If an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

COMMITTEE NOTE

As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the "final judgment." The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of Appeals. *See, e.g.*, *United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995)(citing cases). It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In *Reyes*, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as

the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial. This would be especially true if, as noted by the Court in *Reyes*, *supra* at 67, an appellate court stayed its mandate pending review by the Supreme Court. *See also Herrera v. Collins*, 113 S.Ct. 853, 865-866 (1993)(noting divergent treatment by States of time for filing motions for new trial).

It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.

**Rule 35. Correction or Reduction of Sentence**

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(b) REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28,

United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. The court's authority to reduce a sentence under this ~~subsection~~ subdivision includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

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COMMITTEE NOTE

The amendment to Rule 35(b) is intended to fill a gap in current practice. Under the Sentencing Reform Act and the applicable guidelines, a defendant who has provided "substantial" assistance before sentencing may receive a reduced sentence under United States Sentencing Guideline § 5K1.1. And a defendant who provides substantial assistance after the sentence has been imposed may receive a reduction of the sentence if the Government files a motion under

Rule 35(b). In theory, a defendant who has provided substantial assistance both before and after sentencing could benefit from both § 5K1.1 and Rule 35(b). But a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either provision because each provision requires "substantial assistance." As one court has noted, those two provisions contain distinct "temporal boundaries." *United States v. Drown*, 942 F.2d 55, 59 (1st Cir. 1991).

Although several decisions suggest that a court may aggregate the defendant's pre-sentencing and post-sentencing assistance in determining whether the "substantial assistance" requirement of Rule 35(b) has been met, *United States v. Speed*, 53 F.3d 643, 647-649 (4th Cir. 1995)(Ellis, J. concurring), there is no formal mechanism for doing so. The amendment to Rule 35(b) is designed to fill that need. Thus, the amendment permits the court to consider, in determining the substantiality of post-sentencing assistance, the defendant's pre-sentencing assistance, irrespective of whether that assistance, standing alone, was substantial.

The amendment, however, is not intended to provide a double benefit to the defendant. Thus, if the defendant has already received a reduction of sentence under U.S.S.G. § 5K1.1 for substantial pre-sentencing assistance, he or she may not have that assistance counted again in any Rule 35(b) motion.

**Rule 43. Presence of the Defendant**

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(c) PRESENCE NOT REQUIRED. A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; or

(4) when the proceeding involves a reduction or correction of sentence under Rule ~~35~~ 35(b) or (c) or 18 U.S.C. § 3582(c).

COMMITTEE NOTE

The amendment to Rule 43(c)(4) is intended to address two issues. First, the rule is rewritten to clarify whether a defendant is entitled to be present at resentencing proceedings conducted under Rule 35. As a result of amendments over the last several years to Rule 35, implementation of the Sentencing Reform Act, and caselaw interpretations of Rules 35 and 43, questions had been raised whether the defendant had to be present at those proceedings. Under the

present version of the rule, it could be possible to require the defendant's presence at a "reduction" of sentence hearing conducted under Rule 35(b), but not a "correction" of sentence hearing conducted under Rule 35(a). That potential result seemed at odds with sound practice. As amended, Rule 43(c)(4) would permit a court to reduce or correct a sentence under Rule 35(b) or (c), respectively, without the defendant being present. But a sentencing proceeding being conducted on remand by an appellate court under Rule 35(a) would continue to require the defendant's presence. *See, e.g., United States v. Moree*, 928 F.2d 654, 655-656 (5th Cir. 1991)(noting distinction between presence of defendant at modification of sentencing proceedings and those hearings that impose new sentence after original sentence has been set aside).

The second issue addressed by the amendment is the applicability of Rule 43 to resentencing hearings conducted under 18 U.S.C. § 3582(c). Under that provision, a resentencing may be conducted as a result of retroactive changes to the Sentencing Guidelines by the United States Sentencing Commission or as a result of a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." The amendment provides that a defendant's presence is not required at such proceedings. In the Committee's view, those proceedings are analogous to Rule 35(b) as it read before the Sentencing Reform Act of 1984, where the defendant's presence was not required. Further, the court may only reduce the original sentence under these proceedings.